



## INTERIOR BOARD OF INDIAN APPEALS

Estate of Eastman John Kipp

13 IBIA 242 (08/29/1985)

Reconsideration denied:  
13 IBIA 311



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

## ESTATE OF EASTMAN JOHN KIPP

IBIA 84-43

Decided August 29, 1985

Appeal from an order after rehearing issued by Administrative Law Judge Keith L. Burrowes in Indian Probate IP BI 86A 80, IP PO 27L 77.

Affirmed.

1. Indian Probate: Wills: Failure to Mention Child--Indian Probate: Wills: Failure to Mention Spouse

The failure of an Indian testator to provide for a spouse, children, or other heirs in a will does not invalidate the will.

2. Indian Probate: Evidence: Insufficiency of--Indian Probate: Appeal: Generally

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was incorrect is on the person challenging the decision.

APPEARANCES: Timothy J. Lape, Esq., and Mary Linda Pearson, Esq., both Lewiston, Idaho, for appellant; Frank V. Barton, Esq., Lewiston, Idaho, for the Kipp appellees; Robert E. Kinney, Esq., Orofino, Idaho, for the Miller appellees. Counsel to the Board: Kathryn A. Lynn.

## OPINION BY ADMINISTRATIVE JUDGE LEWIS

On July 23, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Ethel Kipp (appellant). Appellant sought review of a June 6, 1984, order after rehearing issued by Administrative Law Judge Keith L. Burrowes in the estate of Eastman John Kipp (Kippappalekan) (decendent). The June 6, 1984, order accepted a settlement agreement entered into by Charles Kipp and Blanche Kipp Gould, who are decendent's niece and nephew (Kipp appellees), and the lineal heirs and minor children of Gilbert James Miller (Miller), the primary devisee under decendent's 1976 will (Miller appellees). <sup>1/</sup> For the reasons discussed below, the Board affirms that order.

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<sup>1/</sup> Miller died on June 11, 1983, during the pendency of this proceeding. He was survived by several minor children: Joseph Kaley Miller, Dale Lee Miller, Marla Marie Miller, Esther Marie Miller, Gibson Gary Miller, Beverly Jo Miller, and Edna Sue Miller. Robert Kinney, Esq., is the guardian ad litem for these minors.

### Background

Decedent, Unallotted N-3008 of the Nez Perce Indian Reservation in the State of Idaho, was born on December 13, 1910, and died on October 8, 1976. The first hearing to probate decedent's Indian trust estate was held by Administrative Law Judge Robert C. Snashall on March 15, 1977. The case was subsequently reassigned to Judge Burrowes, who held an additional hearing on July 20, 1977. Evidence was presented at the hearings showing that decedent first married Jane Penny Jefferson on June 9, 1935, and that they had four children. Two of these children died as infants; one died as an adult without issue; and the fourth, Harrison Charles Kipp, predeceased his father, leaving a surviving son who had been adopted out. Decedent and Jane Jefferson were divorced in 1938. Appellant and decedent were married on August 29, 1944, in Walla Walla, Washington, had no children together, and had been estranged since approximately 1950. Appellant, who was represented by counsel, appeared and testified at both of these hearings.

Decedent and Miller were lifelong friends, and decedent lived and traveled with Miller for extended periods during the 1950's and 1960's. Decedent had a history of alcohol abuse, and he voluntarily spent considerable amounts of time in rehabilitation hospitals and convalescent homes during the late 1960's and early 1970's. Because of this history and the fear that others might take advantage of decedent, BIA determined on March 23, 1970, that decedent required agency assistance in managing his funds. This determination, which was initiated by appellee Charles Kipp, was not a formal determination of incompetence.

In April 1975 decedent left the nursing home in which he was then residing and moved to Miller's home, where he primarily stayed until his death. 2/ Decedent's only surviving child, Harrison Kipp, died on June 20, 1975. Apparently, the fragile familial ties between decedent and his blood relatives were further strained after Harrison's death.

Decedent contacted Robert Kinney, present counsel for the will proponents, the Miller heirs, for the purpose of making a will. Kinney had represented decedent at his son Harrison's probate hearing. 3/ Decedent came to Kinney's office alone and gave the attorney no reason to believe that the testamentary disposition was not his own. A will was executed on May 14, 1976, which specifically revoked all decedent's prior wills. Subsequent to the execution of the will, Kinney notified decedent that the Solicitor's Office of the Department of the Interior objected to the wording of the ownership interest devised under articles IV and V of the will. 4/ Kinney changed the wording by preparing a new page 2 to the will. Decedent

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2/ Appellant alleges that Miller removed decedent from the nursing home and held him a virtual prisoner.

3/ Kinney states that he never represented Miller in any capacity during decedent's lifetime.

4/ The will was originally written to devise a fee interest. Because the land was held in Indian trust status, decedent could devise only his equitable interest.

returned to Kinney ' s office on June 7, 1976, and signed the new page in the presence of the same two people who had witnessed the will. The witnesses did not sign the new page, and no date except May 14, 1976, appears on the will.

After the second hearing Judge Burrowes issued an order on June 26, 1979, approving the will and ordering distribution of the estate. The Judge found that the will of May 14, 1976, as originally written, should be the document admitted to probate; that the will should be approved because there was no evidence that decedent lacked testamentary capacity or was acting under undue influence; and that appellant and decedent were divorced by Indian custom prior to March 6, 1963, the date the State of Idaho assumed jurisdiction over domestic relations issues between all Indians within the state. He, therefore, ordered distribution of decedent's entire Indian trust estate to Miller in accordance with the term of the May 14, 1976, will.

Appellant and the Kipp appellees independently sought further consideration of this order. Although appellant's filing was termed a "notice of appeal," Judge Burrowes properly treated it as a petition for rehearing. The Kipp appellees filed a request for an extension of time to file a petition for rehearing. Judge Burrowes granted the extension, and a timely petition was subsequently filed. A third hearing was held on March 31, 1981.

Appellant appeared and testified at the third hearing, but was not represented by counsel. After the hearing she retained the counsel who had previously represented her. Her counsel contacted Judge Burrowes and was given until October 16, 1981, to submit evidence on the question of Indian custom divorce among the Nez Perce.

On November 27, 1981, Judge Burrowes wrote to the four attorneys appearing in this case, 5/ informing them that he had received nothing on behalf of appellant's position, and gave her additional time until February 1, 1982, to furnish her evidence. Although a brief on behalf of appellant, dated October 16, 1981, appears in the probate record, 6/ no objection was filed to the Judge's statement that he had not received a brief. Appellant made no further filings or appearances before Judge Burrowes. On February 3, 1982, the Kipp appellees filed a motion to dismiss appellant's petition for rehearing. No response was filed by appellant.

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5/ On rehearing, counsel also appeared for Ellis Eastman Kipp, the minor grandson of decedent. Ellis Kipp had been adopted out through the Idaho state courts. Although counsel, who was appointed Ellis Kipp's guardian ad litem for the probate hearing, argued that the state court adoption was invalid, he was apparently unsuccessful in having it set aside and did not pursue the matter further before the Department.

6/ This brief is not date-stamped by Judge Burrowes' office and is out of chronological order. The Board will assume arguendo that the brief was timely filed. The substance of the brief, concerning whether appellant and decedent were divorced, is discussed, infra.

Subsequently, in March of 1984, the Kipp appellees and Miller <sup>7/</sup> negotiated a settlement agreement under which Miller was to receive all funds in decedent's Individual Indian Money account and the Kipp appellees would receive decedent's trust land. This settlement was accepted by Judge Burrowes on June 6, 1984. The Judge specifically found that appellant had failed to perfect her appeal and was no longer a party.

On July 19, 1984, the Board received appellant's notice of appeal from the order approving settlement. The probate record was requested and, upon its receipt, the appeal was docketed on September 6, 1984. Appellant was given 30 days from receipt of the Board's notice of docketing to file an opening brief. No brief was timely filed. On October 23 and 29, 1984, the Board received motions from the Kipp appellees and Miller appellees, respectively, for expedited consideration on the record as constituted.

On November 1, 1984, the Board received a motion for extension of time from counsel for appellant, claiming excusable neglect in failing to file an opening brief. While the Board was reviewing the record preparatory to ruling on the motions, on December 10, 1984, it received a motion for substitution of appellant's counsel and for extension of time. An opening brief was received on January 8, 1985, before the Board had ruled on the motions. Over the objections of opposing counsel, the Board accepted the late-filed brief. Answer briefs were filed by both groups of appellees, and appellant filed a reply brief.

### Discussion and Conclusions

[1] Although appellant devotes much time to the question of whether she was divorced from decedent by Indian custom, her marital status is relevant only if decedent died intestate. Even assuming that she was decedent's surviving spouse, there is no rule prohibiting an Indian testator from disinheriting a spouse as to Indian trust property under the jurisdiction of the Department of the Interior. See, e.g., Blanset v. Cardin, 256 U.S. 319 (1921); Estate of George Yellow Wolf, 5 IBIA 70 (1976). There is, furthermore, no rule requiring an Indian testator to mention and specifically disinherit probable heirs. See, e.g., Estate of Andrew Jackson, 12 IBIA 39 (1983); Estate of Frank (Francis) Keahtigh, 9 IBIA 190 (1982). Therefore, if decedent's will is valid, appellant has no right to take any of decedent's estate.

[2] In his June 26, 1979, order, Judge Burrowes specifically found that decedent's May 14, 1976, will was valid, despite objections that decedent lacked testamentary capacity and was subjected to undue influence. Appellant bears the burden of proving the error of this decision. Estate of Paul Wilford Hail, 13 IBIA 140 (1985); Estate of Pearl Asepermy Werqueyah, 13 IBIA 49 (1984); Estate of Fred Redstone, Sr., 13 IBIA 44 (1984).

Appellant attempts to carry her burden of proof through an affidavit from one of the individuals who testified at the second hearing. In this

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<sup>7/</sup> Miller's position was adopted by the present Miller appellees after his death on June 11, 1983.

affidavit, the witness retracts his testimony and states that Miller was holding decedent prisoner. This affidavit was itself later retracted, and the witness has since died. The Board can give no credence to any of these clearly contradictory statements. Although appellant also submits other affidavits, the Board finds them insufficient to overcome testimony, including that of the will scrivener and the witnesses, that decedent was not acting under undue influence in executing his will. 8/ Therefore, Judge Burrowes' finding that the May 14, 1976, will was valid is affirmed. 9/ Because of this conclusion and for the reasons stated above, appellant's marital status is irrelevant and will not be further discussed.

Appellant also argues the invalidity of the 1984 compromise settlement. Appellant was given every opportunity to participate in the rehearing proceedings. Whether or not her October 16, 1981, brief was timely submitted, appellant failed to participate in the rehearing and to respond to requests for information from Judge Burrowes. The Board finds that Judge Burrowes correctly held that appellant, through her silence of over 2 years, failed to perfect her appeal and was no longer a party when the settlement was signed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is affirmed.

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//original signed

Anne Poindexter Lewis  
Administrative Judge

We concur:

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//original signed

Bernard V. Parrette  
Chief Administrative Judge

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//original signed

Jerry Muskrat  
Administrative Judge

8/ Appellant also suggests that decedent and Miller were in a confidential relationship and that accordingly, there was a presumption of undue influence. The facts of this case are not sufficient to raise this presumption, because there is no evidence that Miller participated in the preparation of decedent's will, and also because Miller had no personal or professional relationship with decedent's attorney. See, e.g., Estate of Charles Webster Hills, 13 IBIA 188, 194, 92 I.D. 304, 307 (1985).

9/ This conclusion necessarily includes an affirmance of the Judge's finding that the alteration of page 2 of the will was a nullity and did not revoke the May will.